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The State of Emergency and Human Rights

John W. Sap

ELSPETH GUILD, *Security and European Human Rights: protecting individual rights in times of exception and military action* (Nijmegen, Wolf Legal Publishers 2007) 82 p., ISBN 9789058502568

ULF HÄUSSLER, *Ensuring and Enforcing Human Security. The Practice of International Peace Missions* (Nijmegen, Wolf Legal Publishers 2007) 180 p., ISBN 9789058502575

COLIN TURPIN and ADAM TOMKINS, *British Government and the Constitution. Text and Materials*. Sixth edition. (Cambridge, Cambridge University Press 2007) 847 p., ISBN 9780521690294

One of the key obligations of states is to provide security to their citizens in the form of protection against aggression or attack. When there is a war or when there is a serious threat to the existence of the state, exceptional measures to restore peace and order may be inevitable. According to Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the relevant case-law, a state of emergency can be justified only by an exceptional situation of crisis which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed. The threat must be imminent; its effects must involve the whole nation; the continuance of the organised life of the nation must be threatened; the crisis or danger must be exceptional in the sense that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate. In a state of emergency measures can be taken that derogate from the protection normally afforded by human rights. This is not new. Rights are not absolute and may legitimately be limited by law. But a derogation must be proportional to the emergency. People can only be detained without trial for the specific purpose of restoring peace and order during an emergency. The government will have to justify the continued detention of such people to a court, and there are still certain rights that it is not permissible to derogate from.

What is the meaning of a state of emergency and the rule of law in the post 9/11 period? The attacks on the World Trade Center and the Pentagon were de-

scribed as acts of war, and the attacks on the United States of America clearly intended to threaten the life of that nation. President George W. Bush declared a 'War on Terrorism', with the goals of bringing Osama bin Laden and Al-Qaeda 'to justice' through economic sanctions and military actions against states, which has been interpreted as legitimising an emergency situation. Because the war on terrorism will not end until the terrorists have been defeated, according to the Commander-in-Chief, the state of emergency now seems to be constant. It will take some time to defeat terrorism. Even after the 2004 presidential elections, George W. Bush continued a state of emergency, bringing more and more power to the executive branch. The fact that the USA has not differentiated between the terrorists who carry out these acts and those who harbour them has huge consequences, also for EU member states. Not only does the question arise of how well Western democracies have defended the civil liberties during the war on terror, but also of what role the respective state powers – government, parliament and the courts – should play in balancing civil liberties and terrorist threats.

Protecting the life of the nation is one of the most important tasks of a government. A state of emergency may only be declared when the life of the nation is threatened. This will occur when, in the light of threats facing the nation, the normal powers of the authorities have become inadequate to govern the country. It would be surprising if courts were able to make better judgments than governments in this field. How does Europe deal with this tension between law and exception when governments see an existing terrorist threat to their liberal democracy from persons suspected of involvement in international terrorism? What if foreign nationals present in these democracies are suspected of being involved in the commission, preparation or instigation of acts of international terrorism, or of being members of organisations having links with terrorists? The 2001 order in the UK, which declared that the events of 11 September were 'threatening the life of the nation', allowed Britain to opt out of Article 5 of the European Convention on Human Rights, which bans detention without trial. It paved the way for the indefinite imprisonment of foreign nationals who the Government suspects of being terrorists, and came less than 24 hours after warnings that Britain was a top target for Osama bin Laden's Al-Qaeda terrorist network. People objected to it, but the British government was determined 'to get the balance right' between human rights and society's right to live free from terror. Downing Street believed that the public would back the moves, which it said were necessary to maintain national security. Over the last few years most governments have changed immigration laws and banking laws. Everybody is aware of the fact that preventing terrorists from boarding an aircraft has become a primary concern. The 'War on Terrorism' seems to have the imminent dangers of bringing too much power to the government and of reducing civil liberties. Therefore, sometimes the courts will have to intervene.

In *Security and European Human Rights: protecting individual rights in times of exception and military action* Elspeth Guild shows how European courts have responded to the charge of exceeding the law in the name of collective security. She analyses the Articles of the European Convention on Human Rights and the interpretations of the European Court of Human Rights. During the derogation of Northern Ireland (1988-2001), in respect of Article 5 (right to liberty and security), the European Court on Human Rights accepted the arguments of UK authorities and confirmed that a wide margin of appreciation should be left to member states as regards the assessment of an emergency threatening the life of the nation. The Court even went so far as to accept the idea that there was a 'quasi-permanent nature' to the emergency in Northern Ireland. But on 18 December 2001, again in respect of Article 5, the United Kingdom introduced a new derogation under Article 15, enabling the United Kingdom to pass legislation providing for the indefinite detention of foreigners after the 11 September 2001 attacks in the United States (64). Although the House of Lords accepted the government's argument that there was a state of exception sufficient to justify the use of Article 15, Lord Bingham did not accept that the indefinite detention of foreigners was proportionate to the threat necessary to justify the use of Article 15 of the European Convention on Human Rights.

In her accessible monograph, Elspeth Guild stresses how the supranational human rights system is deployed by courts at the national level in ways which impede claims made by state authorities to the legitimacy of their declarations of exception. 'In reaching to a source of law beyond the state but binding the state, the national judge exercises his or her authority to adjudicate on the proportionality of the state authorities' efforts to escape some of their supra-national human rights obligations' (29). When the UK Attorney General attacked the wide jurisdiction of the House of Lords in the matter of interpretation of the derogation, he argued that the courts should not interfere with the Government's assessment of the requirements of the exceptional times as this would be contrary to the principles of parliamentary democracy. But Lord Bingham answered that the responsibility of independent courts to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. And courts are required to take account of relevant Strasbourg jurisprudence. As Guild points out clearly, the legality of a member state's derogation to rights under the European Convention on Human Rights is not a purely internal decision for that state. If challenged by another state or an individual it is subject to supranational scrutiny by the European Court of Human Rights.

Guild writes that the issue of member state obedience to the judgments of the European Court on Human Rights is beyond the scope of her book (31). But she does illustrate that there is a reinforcement of supranational human rights in Eu-

rope through the enforcement mechanisms of the European Union (Articles 6 and 7 EU). Although many lawyers will consider these EU mechanisms as too weak, Guild defends that because of the 'weaving together' of the supranational legal regimes which reinforce the disciplining of the disobedient state, the space left for a state of exception is increasingly narrow. Guild states: 'The rapid speed of the rotation around the sun of the planet Mercury (i.e. the declaration of an emergency by a state's authorities) is moderated by the slow revolution of the planet Saturn (the supranational court) ... European state authorities are not 'sovereign' in the act of exception' (31).

That is an important difference with the USA where, with the help of the media, the emergency situation became the basis for granting exceptional powers to the executive branch. Guild writes that 'the European Court on Human Rights has shown no reluctance in defining torture, inhuman and degrading treatment in such a way as to exclude some of the finer semantic arguments used by some (current and former) officials within the US administration to justify what are considered, in the European domain, dubious practices' (57).¹ 'They hate our freedoms', President George Bush said in a speech to the American Congress in 2001. But are these famous freedoms defended well enough? When new circumstances ask for a new balance between personal liberty and public safety, it can be dangerous when emergency decrees lead to the fusion of legislative and executive power. There is a growing tension between presidentialism and court-centred constitutionalism. It is true, legal authority can undermine the state authorities' claims to legitimacy. But the question is whether courts, without seeing the 'closed material' that governments possess, have enough information to decide whether something *does* or *does not* threaten the life of the nation. Of course, the courts do need to review states of emergency, but it would also have been wise if Guild had underlined the importance of parliamentary control over governments during states of emergency.

This is the point of view taken by Colin Turpin and Adam Tomkins in the well-established sixth edition of *British Government and the Constitution*, an ideal book for law students and also very attractive for students of politics and government. The authors pay a great deal of attention to the question of whether or not there was a particular threat to the United Kingdom in 2001. They conclude that questions of whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and the Parliament. But Turpin and Tomkins also quote Lord Hoffmann in *A. v. Secretary for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, who came up with a different and very challenging opinion on this point (766):

¹ In a footnote Guild mentions an article by John Yoo, 'Courts at War', 91 *Cornell Law Review* 573 (2006). Yoo is an ardent promoter of executive rights in the war on terror.

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community... The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

The American lawyers of the Department of Justice and the Pentagon said that President George W. Bush had the power to override both domestic and international law as a wartime Commander in Chief whose main duty was to protect the American people. When the United States opened a new front in Afghanistan and Iraq for the international fight against Al-Qaeda, they argued that Al-Qaeda and its Taliban allies were not a state party to the Geneva Conventions. Do desperate times really demand desperate remedies like arbitrary arrest, indefinite detention without trial, suspension of *habeas corpus*, and even torture? The terrorist attacks of 11 September 2001 seem to be the beginning of a period of international state emergency too, because the lines between internal and external security are much more difficult to draw. This is a theme which is touched upon in a book about the legal framework of peace missions, *Ensuring and Enforcing Human Security*. It is written by Ulf Häussler and has a foreword by Elspeth Guild, the same foreword she uses for own book.

Peace missions are policy tools whose purpose is to make a substantial contribution to the maintenance or restoration of international peace and security. In launching them, the international community seeks to support stable constitutional democracies based on respect for human rights and such good governance as enables sustainable development. According to Ulf Häussler, aspects of institution-building, or even nation-building, are part of the respective fields of responsibility of peacekeepers and peace-builders. Although not everybody will agree, here it is possible to draw a link between the ambition of the governments of the USA and the UK to reform political establishments in some countries and to construct them into democratic constitutional states (Afghanistan, Iraq).

Häussler does mention the involvement of EU member states in interventions authorised by the Security Council (Interfet in East Timor [1999], *Opération Turquoise* launched by France in Western Rwanda [1994], and the EU mission Artemis in the Democratic Republic of Congo [2003]). In my view, the option of inter-

vention deserves much more research – as a means to implement the responsibility to protect – in cases where the Security Council cannot reach an agreement on the assessment of a humanitarian crisis situation and/or the response to it (NATO's Operation Allied Force in Kosovo [1999]). A very intriguing development is that the African Union has acknowledged the need for future intervention in Article 4 of its Constituent Act:

The Union shall function in accordance with the following principles:

(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; ...

The author looks into the limits of authority as defined in principles and rules of human rights and international humanitarian law. In peacekeeping, the agenda of the military forces during deployment is very different from their domestic role in a stable constitutional democracy. In the home country, the role is limited (to external security), and internal security challenges are the domain of the police. Häussler states:

Contemporary constitutional democracies only employ their troops domestically in a state of emergency – and they are extremely reluctant to use this *ultima ratio* of defending their sovereignty internally. Frequently entrenched in constitutional law, the differentiation between internal and external security and the separation of police tasks and military tasks accordingly, is an expression of the domestication of the Westphalian sovereign: any practice of law enforcement involving acts of (civil) war inflicted by a government on its own nation is irreconcilable with the notion of democracy.⁽¹⁰⁾

Because international humanitarian efforts and human rights law are reaching out into each other's respective domains, Ulf Häussler presents two relevant questions concerning the applicability of international human rights instruments to peace missions: 1) do human rights instruments apply during armed conflict and also during peace missions?; 2) are human rights instruments extraterritorially applicable? (68). Human rights instruments address the first question in their derogations clauses concerning cases of states of emergency. The Covenant on Civil and Political Rights (1966) could be regarded as 'ambivalent' in this respect: Article 4 of the Covenant refers to a 'time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. Article 15 of the European Convention on Human Rights (1950), however, speaks of 'time of war or other public emergency threatening the life of the nation' and Article 27 of the American Convention on Human Rights (1969) deals with 'time of war, public

danger, or other emergency that threatens the independence or security of a State Party'. Concerning the second question: one may doubt whether the framers of the human rights treaties had the classical differentiation between own and foreign nationals in mind when they devised these instruments and their derogations clauses. Derogations clauses were adopted with a view to tackling nothing but the domestic state of emergency, usually concomitant with armed conflict (70).

After systematic evaluations of relevant military operations and decision-making processes, Häussler concludes that the legal framework of peace missions is complex and that the limits of authority in peace missions are less than well-defined. But it should be beyond doubt that from the perspective of those living in a state receiving a peace mission, the notion of peace and security means that their human rights are protected and ensured (168). Western democracies under the rule of law always have to defend their precious freedoms, even outside their state borders. Human rights are and will be their most important weapon in the fight against tyranny and terror, at home and abroad.

